A

EON BANK BHD

v.

EDWINA LAU

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[ORIGINATING SUMMONS NO: OS-24-276-2001-III (II)]
20 JANUARY 2006

C ***CIVIL PROCEDURE:*** *Action - Res judicata - Applicability - Issues - Foreclosure action - Whether a final judgment - Whether an enforcement of a statutory right - Whether doctrine of res judicata could succeed as a defence to the action - Low Lee Lian v. Ban Hin Lee Bank Bhd - Land Code (Cap 81) (Sarawak), s.148(2)(c) - Limitation Ordinance*
D *(cap 49) (Sarawak), Item 115*

The defendant was/is the registered proprietor of all that parcel of land together with the building thereon and appurtenances thereof situated at Foochow Road No 1 Kuching, Sarawak ('the said
E land'). The said land was charged to the plaintiff *vide* memorandum of charge. On 20 August 1988, the plaintiff commenced foreclosure proceedings *vide* Originating Summons no. KG 221 of 1988 (for brevity, "the 1988 OS") against the defendant for an order for sale of the said land under and by virtue of memoranda
F of charge No. L.5214/1981 and memoranda charge no. l. 5215/ 1981 pursuant to the provisions of s. 148(2)(c) of the Land Code (Cap 81) (Sarawak). On 16 January 1989, the plaintiff had, *vide* a court order of idem date (for brevity, 'the 1989 Order'), obtained an order for sale against the defendant. On 26 April 1989, the
G plaintiff, *vide* summons for directions of idem date (for brevity, 'the said summons for directions'), applied to this court for directions for the sale of the said land by public auction pursuant to the 1989 Order. The said summons for directions was fixed for hearing on 10 June 1989. Counsel for the plaintiff did not attend the
H hearing on the said date and the said summons for directions was consequently struck off. On 26 August 1989, the plaintiff obtained a court order for idem date, *inter alia*, that the summons for directions which was struck off be reinstated. On 16 November 1989, the defendant, *vide* summons in chambers of idem date,
I applied to the court *inter alia* for the 1989 order to be 'set aside and/or alternatively be stayed until further order. 'The said summons in chambers dated 16 November 1989 was fixed for hearing on 6 February 1990, on which date the defendant had

withdrawn the said summons in chambers dated 16 November 1989. Subsequently the plaintiff had filed a notice of discontinuance dated 2 February 1990 and had served the same unto the defendant. During the period between May 1990 to August 1998, pursuant to an arrangement between the defendant and the plaintiff, the defendant had, *vide* certain monthly installments, made part payments towards her indebtedness of the 1989 Order. In Originating Summons No. 24-276-2001-III/II, the plaintiff was claiming against the defendant for an order, *inter alia*, that the said land be sold by public auction and the outstanding sum of RM165,880.86 up to 31 March 2001. On 13 October 2005, pursuant to the order of the court of idem date, the issue of indebtedness of the defendant to the plaintiff was fully settled and determined in accordance to the ruling of the High Court in the Suit No. 22-75-2002 –III (II) which was presently on appeal to the court of appeal. The only issue which was ordered to proceed to trial in the matter herein and/or be disputed between the parties in the trial of the matter hereof shall be the issue of *res judicata*. The issue that arose was whether the doctrine of *res judicata* could succeed as a defence to the action of the plaintiff in the Originating Summons No. 24-276-2001-III (II).

Held:

(1) As to whether an order under a foreclosure action is a final judgment, *Low Lee Lian v. Ban Hin Lee Bank Bhd* emphatically states that it is not a final judgment on the ground that it is an enforcement of a statutory right as opposed to a contractual right and hence the doctrine of *res judicata* does not apply. The decision therein binds this court and accordingly the defendant could not use the doctrine of *res judicata* as a defense in this action. (paras 10 & 11)

(2) The notice of discontinuance dated 2 February 1990 filed by the plaintiff in respect of Originating Summons No. KG 221 of 1988 was effective despite the fact no leave was obtained by the plaintiff under O. 21 r. 3(1) and (2) of the Rules of the High Court 1980. This court was armed with O. 1A of the Rules of the High Court 1980 which dictates that the court look at the justice of the case and not only to technical non-compliance of the rules. Here, from the agreed facts and the tendered documents, one could easily discern why there was a discontinuance of Originating Summons No. KG 221 of 1988 in 1990. The parties had come to an agreement as to

A the repayment of the then outstanding loan amount and one of the terms must have been the discontinuance of the suit. Pursuant to the aforesaid agreement, the plaintiff filed the notice of discontinuance and served the same on the defendant who did not question the validity until now. Further
B during the period from May 1990 to August 1998, the defendant had made part payments towards her indebtedness of the 1989 Order. So for all intent and purpose, the parties had treated the notice of discontinuance as effective. In any event her conducts including silence for more than ten years
C estopped her from questioning the validity of the discontinuance. The doctrine of *res judicata* does not apply. (paras 12 & 13)

(3) Even if the 1989 Order was still effective, it would not avail
D the defendant. The 1989 Order was only the first step towards the enforcement of a statutory right under the Land Code (Cap 81) (Sarawak) and that right's lifespan was 60 years as provided for under Item 115 of the Limitation Ordinance (Cap 49) (Sarawak). (para 14)

E *[Held accordingly.]*

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 FC ***(refd)***

F *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 CA* ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Legislation referred to:

National Land Code, s. 256(3)

G Rules of the High Court 1980, O. 1A, O. 21 r. 3(1)(2)

For the plaintiff - Suhana Razali; M/s Abdul Rahim, Sarkawi, Razak Tready, Fadillah & Co

For the defendant - Satinder Singh Sandhu; M/s Sandhu & Co

H *Reported by Suhainah Wahiduddin*

JUDGMENT

David Wong Dak Wah JC:

I **Backgrounds**

[1] At the outset both parties agreed that the trial of this suit be done in the following manner:

(a) based on the agreed issue, facts and the bundle of documents prepared and submitted by the parties;

(b) without oral evidences; and

(c) based on written and oral submissions.

[2] Pursuant to aforesaid agreement, counsels on 12 December 2005 tendered their respective submissions and on 3 January 2006 exchanged replies to their aforesaid submissions.

[3] The Agreed Facts Are As Follows:

1. The defendant was/is the registered proprietor of all that parcel of land together with the building thereon and appurtenances thereof situate at Foochow Road No. 1, Kuching, Sarawak, containing an area of 901.69 sq. metre, more or less, and described as Lot 5191, Section 64, Kuching Town land District (for brevity, "the said land").

2. The said land was charged to the plaintiff *vide* Memorandum of Charge No. L. 5214/1981 (for brevity, "Memoranda Charge No. L. 5214/1981") and Memorandum of Charge No. L. 5215/1981 (for brevity, the latter charge is referred to as "Memoranda Charge No. L. 5215/1981").

3. The Memoranda Charge No. 5215/1981 was created for an Overdraft Facility granted to Ming Construction (for brevity, "the said overdraft facility"), the Memoranda Charge No. L. 5215/1981 being to secure repayment of the principal amount of the facility in the sum of RM80,000 together with any other interests and/or monies due and owing under the said overdraft facility.

4. On or about 20 August 1988, the plaintiff (then known as Oriental Bank Berhad) commenced foreclosure proceedings *vide* Originating Summons No. KG 221 of 1988 (for brevity, "the 1988 OS") against the defendant for an order for sale of the said land under and by virtue of Memoranda Charge No. L. 5214/1981 and Memoranda Charge No. L 25 5215/1981 pursuant to the provisions of s. 148(2)(c) of the Land Code (Cap 81).

5. On 16 January 1989, the plaintiff had, *vide* a Court Order of idem date (for brevity, "the 1989 Order"), obtained an order for sale against the defendant, namely that the said land:

A … charged in favour of the Plaintiff abovenamed *vide* Memoranda of Charge Instrument No. 5214/1981 and No. L 5215/1981 … Be Sold By Public Auction under the directions of Section 148 (2) (c) of the Land Code (Cap 81) and under the directions of this Honourable Court to satisfy the sum of Malaysian Ringgit Ninety-two Thousand and Eighty and Sen Ninety-Four Only (M$92,080.94) which is due under the Overdraft Facility as at 30th September, 1987 and the sum of Malaysian Ringgit Fifteen Thousand Nine Hundred and Twenty Four and Sen Seventeen Only (M$15,924.17) due under the Fixed Loan Facility as at 30th September, 1987 together with further interest thereon at the rate of Eleven Point Five (11.5%) per centum per annum on monthly rests on the Overdraft Facility and interest at the rate of Eleven Point Five percent per annum with yearly rests on the Fixed Loan Facility from the 1st day of October, 1987 to the date of full and final payment and that the costs of this application be awarded to the Plaintiff and is subject to Section 151 of the Land Code (Cap 1981).

6. At the hearing on 16 January 1989, both parties were represented by counsel, the plaintiff by Encik Abdul Rahman bin Abg. Haji Abdul Rahim and the defendant by Mr. John Lim.

7. On 26 April 1989, the plaintiff, *vide* summons for directions of idem date (for brevity, "the said summons for directions"), applied to this Honourable Court for directions for the sale of the said land by public auction pursuant to the 1989 Order.

8. The said summons for directions was fixed for hearing on 10 June 1989. Counsel for the plaintiff did not attend the hearing on the said 10 June 1989 and the said summons for directions was consequently struck off. On 26 August 1989, the plaintiff obtained a court order of idem date, *inter alia*, that the "summons for directions dated 26 April 1989, which was struck off on 10 June 1989 be reinstated …".

9. On 16 November 1989, the defendant, *vide* summons in chambers of idem date, applied to the Honourable Court, *inter alia*, for the 1989 Order to be "set aside and/or alternatively be stayed until further order." The said summons in chambers dated 16 November 1989 was fixed for hearing on 6 February 1990, on which date, the defendant had withdrawn the said summons in chambers dated 16 November 1989.

10. Subsequently, the plaintiff had filed a notice of discontinuance dated 2 February 1990 and had served the same unto the defendant.

11. During the period between May 1990 to August 1998, pursuant to an arrangement between the defendant and the plaintiff, the defendant had, *vide* certain monthly installments, made part payments towards her indebtedness of the 1989 Order.

12. In Originating Summons No. 24-276-2001-III/II, the plaintiff is claiming against the defendant for an order, *inter alia,* that:

> 1. The Defendant's land described in the Schedule hereunder and charged in favour of the said Plaintiff *vide* Memorandum of Charge Instrument No. L. 5215/1981 registered at the Kuching Land Registry Office on the 30th day of May, 1981 be sold by public auction under the directions of this Honourable Court pursuant to the provisions of Section 148(2)(c) and Section 151 of the land Code (Cap 81) to satisfy:
>
> (a) the outstanding sum of RM165,880.86 up to the 31st day of March, 2001; and
>
> (b) further interest at the rate of 2.50% per annum above the Base Lending Rate at 6.80% per annum.

13. On 13 October 2005, pursuant to the Order of the Court of idem date, the issue of indebtedness of the defendant to the plaintiff was fully settled and determined in accordance to the ruling of the High Court in the Suit No. 22-75-2002-III (II) which is presently on appeal to the Court of Appeal and the only issue which was ordered to proceed to trial in the matter herein and/or be disputed between the parties in the trial of the matter hereof shall be the issue of *res judicata.* The said order of 13 October 2005 contains, *inter alia*, the following terms:

> IT IS HEREBY ORDERED that in accordance with the ruling made on the 12th day of November 2004 in the High Court Civil Suit No. 22-75-2002-III/II:
>
> (1) That the terms of Memorandum of Charge Instrument No. L 5215/1981 (for brevity, "the second charge") shall be interpreted to mean that the maximum liability of the plaintiff under the second charge was to repay

the overdraft facility of RM80,000 as well as all the other sums including the interests stated therein;

(2) Accordingly judgment be and is hereby entered in favour of the plaintiff in respect of the issue raised in paras 4 to 12 of the affidavit in opposition affirmed by the defendant on 8 February 2002 and filed herein; and

(3) The remaining issues on the plea of *res judicata* raised in paras 3 to 6 of the defendant's supplementary affidavit in opposition affirmed on 25 February 2002 and filed herein shall proceed to trial.

[4] The Agreed Issue Is As Follows:

Whether the doctrine of *res judicata* can succeed as a defence to the action of the Plaintiff in the Originating Summons No. 24-276-2001-III (II)?

Contentions Of Parties

[5] The contention of the defendant's counsel in his words is as follows:

3.2 It is apparent from the 1988 OS and 2001 OS that the parties, facts, issues and claims in both Originating Summons, and, therefore, the cause of action in them, are the same. This fact is also apparent from the agreed facts in STATEMENT OF AGREED FACTS.

3.3 The claim in the 1988 OS was for the statutory remedy of foreclosure of the said land under the Memoranda of Charge pursuant to the provisions of Section 148(2) of the Land Code (Cap. 81). The claim in the 2001 OS is substantially a repeat of the same statutory remedy pursuant to the provisions of Section 148(2).

[6] Simply put, the plaintiff is barred by the 1989 Order from bringing the present action by virtue of the doctrine of *res judicata*.

For the plaintiff, the contention is that the doctrine of *res judicata* does not apply as the 1989 Order is not a final judgment.

Findings Of The Court

[7] What is the doctrine of *res judicata*? Many cases have dealt with this doctrine and suffice for me to just refer to the case *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where Peh Swee Chin FCJ *inter alia* at the following passage:

It simply means a matter adjudged and its significance lies in its effect of creating estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between the parties … The significance of *res judicata* lies in its effect of creating an estoppel *per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular action in Court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue, which a party is estopped from raising in a subsequent proceeding.

[8] The question whether an order of sale under a foreclosure proceeding result in a final judgment has been settled by the Supreme Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 where Gopal Sri Ram JCA held as follows:

Further, an order for sale made pursuant to s. 256 of the Code is not a judgment. That was settled by the decision of the Supreme Court in *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p. 258):

> Here, there was no judgment debt. The claim of the appellant in the Court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge. (emphasis added).

His Lordship in that case drew support for his view from the judgment of Ong CJ (Malaya) in *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 MLJ 95.

In *Kandiah Peter v. Public Bank Bhd.* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor to satisfy the Court that there existed cause to the contrary did not bar a subsequent action *in personam* brought by the chargor based upon the same facts that did not avail him in opposing the application under s. 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

A The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by
B exercising his statutory remedy against the chargor in default.The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for
C foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our Courts which have correctly stated the law upon the subject. …

D It is equally settled law that in order for the doctrines of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree;

E 16 *Halsbury's Laws of England* (4th Ed) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree. In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing
F a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

G For our part, we would affirm what has been said in the foregoing passage as accurately representing the law upon the subject.

H **[9]** Learned counsel for the defendant attempts to distinguish the above case on the ground that it concerns s. 256(3) of the National Land Code while in this case we are concerned with s. 148(2) of the Land Code (Sarawak Cap 81) which has different wordings to the National Land Code which talks of "cause to the
I contrary" while in the Land Code (Sarawak Cap 81), refers to "such order as in the circumstances seem just". He further submits that this court should be slow in applying decisions on s. 256(3) of the National Land Code to the local situation and in

support cited the case of *Century Land Resources Sdn. Bhd. v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, where the Court of Appeal warned against "the danger of courts in Sarawak applying decisions under s. 256 of the National Land Code without addressing the differences between the two provisions". The relevant passages from the aforesaid case are as follows:

> Now, although s. 148(3) of the Sarawak Land Code is similar in effect to s. 254(1) of the National Land Code (see, *Citibank v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739), ss. 148(1) and (2) of the former are differently constructed from s. 256 of the latter. Under s. 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: the only consideration being that of justice in the circumstances of the case. Thus, if a chargee applies for an order for sale, the court, by virtue of s. 148(2), may, if it does not in the circumstances seem just, refuse that order and in its stead make, for example, an order directing that the chargee receive the rents and profits from the charged land. Such an order may well be made in cases where the value of the charged property far exceeds the sum owing and the charged property is producing sufficient income to repay the loan within a reasonable time.
>
> Contrast this with s. 256 of the National Land Code the terms of which are imperative. In essence it says that the court "shall" make an order for sale unless there is shown "cause to the contrary". So, the court is under a duty to make an order for sale when no cause to the contrary is shown. The Federal Court in *Low Lee Lian* emphasised this:
>
> As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. (emphasis added.)
>
> A court in the States of Malaya does not therefore have a choice as to the type of order it may make when moved by a chargee under s. 256 of the National Land Code.
>
> …
>
> In our judgment, the courts of Sarawak are on safer ground in relying on cases decided under the parallel section in the New South Wales legislation which is closer to s. 148. The similarity may be seen from the case of *Campbell v. The Commercial Banking Company of Sydney* where the Privy Council had to interpret s. 55 of the Real Property Act of New South Wales (Stat. 26 Vict. No. 9) which reads:

> Mortgage and incumbrance under this Act shall have effect its security, but shall not operate as a transfer of the land thereby charged, and in case default be made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof thereby secured, or in the observance of any covenant expressed in any memorandum of mortgage, or of incumbrance registered under this Act, or that is hereinafter declared to be implied in such instrument, and such default be continued for the space of one calendar month, or for such other period of time its may therein for that purpose be expressly limited, the mortgagee or incumbrance may give to the mortgagor or incumbrancer notice in writing, to pay the money then due or owing on such memorandum of mortgage or of incumbrance or to observe the covenants therein expressed or implied, as the case may be, and that sale will be effected unless such default be remedied, or may leave such notice on the mortgaged or incumbered land, or at the usual or last known place of abode in the colony of the mortgagor or incumbrancer, or other person claiming to be then entitled to the said land, or with his known agent.

The Privy Council there was faced with very much the same argument as advanced by the Defendant's counsel in this case, namely, that the Plaintiff's notice had demanded too much. This is how the Board dealt with it:

> As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships' opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less. (emphasis added.)

[10] A cursory reading of the above passage shows that the warning of the Court of Appeal does not really concern with the issue at hand, which is whether or not an order under a foreclosure action is a final judgment. The Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)* emphatically states that it is not a final judgment on the ground that it is an enforcement of a statutory right as opposed to a contractual right and hence the doctrine of *res judicata* does not apply.

[11] Not only do I agree with the Supreme Court, their decision binds this court and accordingly I hold that the defendant cannot use the doctrine of *res judicata* as a defense in this action.

[12] In any event, it is my finding that the notice of discontinuance dated 2 February 1990 filed by the plaintiff in respect of Originating Summons No KG 221 of 1988 was effective despite the fact no leave was obtained by the plaintiff under O. 21 r. 3(1) and (2) of the Rules of the High Court. This court is now armed with O. 1A of the Rules of the High Court which dictates that I look at the justice of the case and not only to technical non compliance of the rules. Here from the agreed facts and the tendered documents, one can easily discern why there was a discontinuance of Originating Summons No KG 221 of 1988 in 1990. The parties had come to an agreement as to the repayment of the then outstanding loan amount and one of the terms must have been the discontinuance of the suit. Pursuant to the aforesaid agreement, the plaintiff filed the notice of discontinuance and served the same on the defendant who did not question the validity until now. Further during the period from May 1990 to August 1998, the defendant had made part payments towards her indebtedness of the 1989 Order. (see paras. 10 and 11 of statement of agreed facts). So for all intent and purpose, the parties had treated the notice of discontinuance as effective. In any event her conducts including silence for more than 10 years estopped her from questioning the validity of the discontinuance.

[13] Accordingly on this ground as well, I hold that the doctrine of *res judicata* does not apply.

[14] Even if the 1989 Order is still effective, it would not avail the defendant. The 1989 Order is only the first step towards the enforcement of a statutory right under the Land Code (Sarawak Cap 81) and that right's lifespan is 60 years as provided for under Item 115 of the Limitation Ordinance (Sarawak Cap 49).

[15] Based on the above reasons, I hereby grant order in terms as in prayers 1, 2 15 and 3 of encl. 2.